In the

United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN SWENDIG, JAMES W. MILLER, REMIGIUS GRAB, AND ANTHONY KERR,
Appellants

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,
Appellee

Memorandum Reply to Appellee's Brief

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

JAMES F. AILSHIE,
Solicitor for Appellants

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We have examined the cases cited in Appellee's Brief, and it seems to us that not one of them bears any analogy to the one at bar, except the Harbaugh case decided by the same trial court from which this appeal is taken. Counsel seem to make no distinction between decisions on *easements* and those applying to mere *licenses*.

United States v. Moore, 95 U. S. 760, cited by appellee, was a case involving the status of an Assistant Surgeon in the Navy. There were two inharmonious statutes dealing with

the qualifications and right of advancement for such officers. The court, observed that the construction given to a statute by those charged with the duty of executing it is always entitled to a most respectful consideration, but the case was not determined upon that point. In concluding the opinion the Court said:

> "In cases like this, the construction should be such that both provisions, if possible, may stand. The clause in question was obviously as much intended to have effect as the section with which it is in seeming conflict. It may well be held to be an exception, though not so expressed, to the universality of the language of the latter. This obviates the difficulty, harmonizes the provision, and gives effect to both."

In Heath v. Wallace, 138 U. S. 573, cited by counsel, the question arose as to whether "Lands subject to periodic overflow" were "swamp lands" within the meaning of the Swamp Land Grant made to the State of California by Act of September 28, 1850. The Department caused an investigation to be made by the Surveyor General, and upon the facts held that *the land was not swamp land.* The court held that the findings by the Department were conclusive on such question, and cited with approval U. S. v. Moore, supra. It will be observed that this line of authorities, (and there are many cases to the same effect), simply holds that findings of fact on Departmental matters within the jurisdiction of such Department will not be disturbed by the courts, and that where a statute is ambig-

uous, indefinite, or easily capable of different constructions, the courts will not disturb a construction which has been adopted and acted upon by the Department.

Stoddard v. Chambers, simply holds that a patent issued for lands *reserved from sale by law are not public* lands or subject to sale, and that such patent is simply void. Neither the facts nor the law discussed in that case have any bearing or throw any light upon the case at bar. Here the land patented to appellans was *public land subject to entry and sale.*

Jamestown & Northern R. R. Co., v. Jones, 177 U. S. 125, cited by counsel, is dealing with the Act of 1875 granting a right of way through public lands to railroad companies, and holds that a definite location of the right of way of a railroad is sufficiently made by the actual construction of the road upon the ground although no profile map was ever filed. This case in no way affects the case at bar or throws any light on it.

The case of Smith v. Townsend, 148 U. S. 490, is a case determining the right of one who was within the territorial limits of Oklahoma Territory at the hour of noon, April 22, 1889, to take a homestead under the Act throwing that territory open to homestead entry, and holds that such a person was disqualified to make an entry.

The Act of June 21, 1906, (34 Stat. at Large 335), provided for the opening of the Coeur d'Alene Indian Reservation

and allotment of lands to each man, woman and child, belonging to the Indian tribes, and that the "residue or surplus lands should be opened to settlement and entry under the provisions of the homestead law", and that the money to be derived from the disposition of these lands should be turned into the fund and credited to "the Coeur d'Alene and Confederated Tribes of Indians. *Up to this time neither the Government nor the Indian tribes had received any compensation whatever from plaintiff for an easement or right of way through the Coeur d'-Alene Indian Reservation for electrical power purposes.* When the tracts were disposed of to defendants *they purchased and paid for the entire acreage, including the right of way now claimed by plaintiff.* If plaintiff is to continue to occupy and use this right of way *without paying* "just compensation" therefor under the laws of the State of Idaho providing for condemnation of easements, then, of course, *it will be getting its entire right of way through this land free,* and defendants, on the other hand, will have paid the Government, for the benefit of the Indian tribes, the full value thereof, and will still have to pay taxes thereon and permanently lose the use of this 100 foot strip through their farms. It will have acquired a right of way, it now values at $25,000.00 (Tr. 14), for nothing, whereas another light or power company going into the same territory at any time since the opening of this reservation and patenting of lands to homesteaders would have to purchase or condemn a right of way for like purposes.

McMillan Reservoir Site, 37 L. D. 6, cited by appellee, is dealing with an *easement granted by Act of Congress* for reservoirs and canals, and that Act provided that upon the taking of possession and constructiing the reservoir or canal within the time limited by the Act the right to the easement should vest, and the Department also held that failure to comply with the Statute in these respects would terminate the right. This is the accepted rule both with reference to rights asserted under the Act granting easements for canals, flumes and reservoirs and the railroad right-of-way Act. In each case the right conferred is an *easement* and when complied with becomes a vested right. It is very different with the act now under consideration;—here it is specially provided that the *permit "shall not be held to confer any right, or easement or interest in, to or over any public lands, reservations, or park."* Congress was particularly specific in this respect.

In the case of Nye vs. Washington W. P. Co., the patent on its face specially reserved the permit or easement right granted to the Water Power Company and Nye sought to have his patent amended or a new patent issued so as to be absolute on its face, free from the right of way or servitude. The Secretary ordered Nye's patent, and all others issued under similar circumstances, recalled and new patents issued free from these restrictions (Tr. 111 to 116). Defendants here are not in that position, *their patents are absolute on their face* and

free of any restrictions or servitude. (Delfts. Exhibits 1 to 4, Tr. 91 to 100).

Even under the railroad right-of-way grants the courts hold that a patent subsequently issued carries the fee, subject only to the easement and that upon abandonment the easement reverts, not to the United States but to the homesteader or patentee.

Denver & R. G. Co. vs. Mills, 222 *Fed.* 481;

N. P. R. vs. Townsend, 190 U. .S 267; 47 L. Ed. 1044.

Furthermore, before the *permit in the Nye case to overflow Indian lands* was granted, the Company was required to pay into the U. S. Treasury $1.25 per acre (for some 6240 acres) *for the use of the land,* but here nothing was paid for *the use for the transmission line.*

Plaintiff's assertion that "public policy would seem to demand that an investment * * * * * was not intended by Congress to be as hazardous as the contention of appellant would make it in this case," seems to be fully answered by the closing paragraph of the Act of February 15, 1901, cited in opening brief, and the existing law of every state. Congress was dealing with *public lands, reservations,* etc., and whenever the lands pass into *private ownership* Government control ceases and the owner of a power transmission line has a right to then acquire a

permanent easement by either *purchase* or *condemnation* by paying "just compensation" and the remedy afforded is summary and speedy. It is also well established "that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee."

U. S. vs. Utah Power & Light Co., 209 Fed. 559, citing

Wisconsin Central R. Co. v. U. S. 164 U. S. 190; ..... 41 L. Ed. 399; *Canfield vs. U. S.* 187 U. S. 518; 42 L. Ed. 260.

The right plaintiff contends for here was a *privilege* belonging and pertaining to *the public* and was temporarily conferred upon this company.

Plaintiff's *water right* and power site are private property and are not subject to Government control as is the case where water and power sites are taken on public lands or within forest reserves or public parks, and when the lands through which its power transmission line runs pass into private ownership, the regulation and control over that land and consequently over any lines running through it, passes to the state.

The Federal Water Power Act of June 10, 1920, (41 Stat at L. 1063) to which reference was made on the oral argument, does not, and could not, give the Commission any jurisdiction,

power or authority over the plaintiff's transmission line through these lands. It is now on private property.

We most respectfully submit that the decision of the District Court amounts to granting the plaintiff a perpetual easement over defendants' lands and an affirmance of that judgment would result in converting a *mere license* into a *perpetual easement* and would contravene both the letter and spirit of the Act of Congress under which this permit was granted.

Respectfully submitted,

James F. Ailshie
Solicitor for Appellants.